

Emery Industries, Inc. and International Chemical Workers Union, Local No. 11, AFL-CIO. Case 21-CA-20779

10 February 1984

DECISION AND ORDER

BY CHAIRMAN DOTSON AND MEMBERS
HUNTER AND DENNIS

On 13 September 1982 Administrative Law Judge James M. Kennedy issued the attached decision. The General Counsel filed exceptions and a supporting brief, and the Respondent filed cross-exceptions and a supporting brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,¹ and conclusions² only to the extent consistent with this Decision and Order.

The judge found, and we agree, that the Union had waived its right to bargain over changes in the Respondent's absenteeism policy and, accordingly, that the Respondent did not violate Section 8(a)(5) and (1) of the Act by unilaterally altering that policy. The judge also found that the Respondent violated Section 8(a)(5) and (1) of the Act by refusing to provide the Union with some of the information it had requested for the specific purpose of understanding the need for the new policy and bargaining intelligently on it. The Respondent has excepted to this conclusion, and we find merit in this exception.

As the judge found, the Respondent's industrial relations manager, D. L. Thoreson, wrote a letter to the Union on 21 August 1981. The letter stated that the absentee rate was unacceptable and that the Respondent would shortly implement a new absentee control policy to correct the problem. Thoreson included a copy of the new policy, and suggested a meeting the following week. The Union's representative, D. E. Stutts, responded by letter dated 25 August 1981, demanding the right to bargain over the establishment of the policy, including the question of a need for and the effects of such a policy. Stutts also stated that, in order to bargain intelligently over the matter, the Union demanded the following information:

A. 1. Date on absenteeism for each current employee.

2. Categories and explanations for absences.

3. An explanation of how the company distinguishes an occupational absence from a non-occupational absence.

4. A full history of any disciplinary actions due to attendance problems. Include name of disciplined workers, department he or she works in, health and safety hazards present in the department.

5. Identification of each worker by age, sex, race and head of household.

6. Identification of major medical payments for employees.

7. Copies of any reports prepared on attendance.

B. 1. Who participated in the establishment of the policy, when were meetings held, who was present.

2. Copies of any data considered in drafting the policy.

3. Copies of any earlier drafts.

4. Who informed the Union or made the decision not to inform the union.

On 16 September Thoreson replied that the Respondent would continue to promulgate reasonable rules and regulations, but remained ready to discuss the absentee control policy and to clarify any sections of the policy or their application. Subsequent communications between the parties extending into the end of October confirmed these original positions.

As was noted above, we agree with the judge that the Respondent had retained the right, through the contract's dismissal and management-rights clauses, to discipline employees for "neglect of duty," a term customarily and consistently interpreted to include absenteeism and tardiness; that the Respondent revised its policies numerous times in the past without complaint from the Union about the unilateral nature of those revisions; and that, consequently, the Union had waived the right to engage in midterm bargaining over the changes in the policy. However, we do not agree that the Respondent violated Section 8(a)(5) and (1) of the Act by refusing to provide the Union with certain of the information listed above.³

The Union had waived the right to engage in midterm bargaining over this issue, and accordingly had no right to the information to engage in

¹ The judge inadvertently erred in sec. III.B, of his decision in stating that Industrial Relations Manager Nick Poggas drafted the first written absentee control program in December 1978. The record reveals that the first policy was drafted by Plant Manager Kenneth Mohns; it was revised by Poggas in January 1979.

² We find it unnecessary to rely on fn. 10 of the judge's decision.

³ The judge determined that items A -1 -2 -3 and -7, and B -2 were presumptively relevant; items A -4 -5 and -6 were not proved to be relevant; and items B-1, -3, and -4 were not relevant to potential contract negotiations. He found that the Respondent illegally refused to furnish the Union with those items which were presumptively relevant.

such bargaining. Thus, the question becomes whether the Union adequately informed the Respondent of another legitimate basis for requesting the information, or of the Respondent's obligation to honor such request. *Adams Insulation Co.*, 219 NLRB 211, 214 (1975). We find that the Union did not so inform the Respondent.

Clearly, the Union stated, as its sole purpose in requesting the information, its desire to engage in midterm bargaining over the absentee policies. Accordingly, the Respondent did not have actual notice of any legitimate purpose for the Union's request. Nor did the Respondent obtain constructive notice of a legitimate basis for the information request. As the Board stated in *Brazos Electric Power*, 241 NLRB 1016, 1018 (1979): "[W]here the circumstances surrounding the request are reasonably calculated to put the employer on notice of a relevant purpose which the union has not specifically spelled out, the employer is obligated to divulge the requested information." We find nothing in the record to indicate that the Respondent was on constructive notice that the Union desired this information for any reason other than bargaining over the new absentee policy.⁴ Accordingly, in these circumstances, we find that the Respondent did not violate Section 8(a)(5) and (1) of the Act by refusing to comply with the Union's demand for the information described above.⁵

ORDER

The complaint is dismissed.

⁴ We do not here decide that the information cannot be obtained by the Union under any circumstance. Subject to the requirements of relevance, the Union may obtain the information it seeks if it states some legitimate basis for seeking the information, such as preparing for upcoming contract negotiations, assessing the validity of a grievance, policing compliance with a current contract, or the like.

⁵ See also *Berkline Corp.*, 123 NLRB 685 (1959).

DECISION

JAMES M. KENNEDY, Administrative Law Judge: This case was heard before me at Los Angeles, California, on June 23, 1982, pursuant to a complaint issued by the Regional Director for the National Labor Relations Board for Region 21 on December 18, 1981, and which is based on a charge filed by International Chemical Workers Union, Local No. 11, AFL-CIO (herein called the Union) on October 28, 1981. The complaint alleges that Emery Industries, Inc. (Respondent) has engaged in certain violations of Section 8(a)(5) and (1) of the National Labor Relations Act, as amended (the Act).

Issues

Whether or not Respondent violated its duty to bargain with the Union by refusing to supply it with information regarding the need to modify Respondent's ab-

senteeism policy and whether or not it violated that duty by modifying the policy without giving the Union the opportunity to bargain about it. Respondent defends on the ground that the Union has waived its right to bargain on this topic both by an express contract provision and by its conduct.

All parties were given full opportunity to participate, to introduce relevant evidence, to examine and cross-examine witnesses, to argue orally, and to file briefs. Briefs, which have been carefully considered, were filed on behalf of both the General Counsel and Respondent.

On the entire record of the case, and from my observation of the witnesses and their demeanor, I make the following

FINDINGS OF FACT

I. RESPONDENT'S BUSINESS

Respondent admits it is an Ohio corporation engaged in the manufacture of fatty acids, methyl esters, and glycerin and to having a factory located in Los Angeles, California. It further admits that during the past year, in the course and conduct of its business, it has sold and sent goods and materials valued in excess of \$50,000 to customers outside California. Accordingly it admits, and I find, that it is an employer engaged in commerce and in a business affecting commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

Respondent admits, and I find, that the Union is a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

For the most part the facts are not in significant dispute. The one area of possible dispute is whether the Union "negotiated" regarding the absentee control policy in 1978 and 1979 or whether it was merely informed of the policy changes and upon discussing the policy succeeded in persuading management to modify it slightly.

A. Background

Respondent and the Union have had a collective-bargaining relationship since sometime in 1940. For many years each collective-bargaining contract has contained a management-rights clause¹ and a dismissal clause.² The

¹ The management-rights clause:

Article 15—Management Rights: It is understood and agreed that all of the rights, powers, and authority customarily exercised by Management, and the direction of the working forces except insofar as specifically surrendered by express provisions of this Agreement, is vested in and reserved exclusively to the Company.

² The dismissal clause:

Article 9—Dismissals: It is understood and agreed that including, but not exclusive of, cases of incompetency, insubordination, or neglect of duty on the part of any employee, the Company shall have the right to suspend, demote or dismiss said employee and shall send within three (3) days written notice to the Union of the reason for such action. [Emphasis supplied.]

language of these two clauses has not been modified since at least 1951 and appear in the collective-bargaining agreement covering the period August 27, 1979, to August 26, 1982, which was in effect at the time of the hearing.³

Until 1978 both Respondent and the Union were generally satisfied with the manner in which Respondent dealt with attendance problems. These were handled on an ad hoc basis; if the discipline meted out was offensive to the employee, he or she filed a grievance and the dispute was handled through the grievance-arbitration procedure.⁴ Respondent's authority for proceeding in that fashion is found in the management-rights and dismissal clauses. The first left full operational authority with management except to the extent that the collective-bargaining agreement surrendered it. In that regard, the language of the dismissal clause was consistently interpreted to include attendance matters, as failing to come to work was deemed "neglect of duty." Instances of discipline over the years were not numerous. Respondent's Exhibit 11 shows that from 1969 through the end of 1978 only two individuals were disciplined for absenteeism, both in 1971. They were terminated. Other instances of neglect of duty, involving some 10 employees, occurred during that period and for the most part those individuals were disciplined by termination although 1 was only suspended.

As Respondent's production line operates on a round-the-clock, 7 day-a-week basis, it utilizes a rotating four-shift system to operate the plant. Thus on any given day three full shifts are scheduled to work while the fourth is off. In this circumstance, absences without notice necessarily cause difficulties. Such an absence might require a job to be unfilled for all or part of a shift or might require an employee to be held over from a departing shift, resulting in disruption of that employee's plans and, usually, overtime pay for that employee. Often this was viewed as deleterious, not only by the responsible employee who was asked to cover for an irresponsible one but by management which had to pay more for the labor than it expected.

In late 1978 an employee, Joe Fuller, who was also a union steward, spoke to Plant Manager Kenneth R. Mohns as a grievance meeting was being concluded. Fuller told Mohns that he had received a number of complaints from employees that they were being required to work overtime due to the chronic absenteeism and tardiness of others. Fuller asked if Mohns could do something about the problem.

Mohns testified that he mentioned Fuller's concern to other management officials including the production manager and the then Industrial Relations Manager Nick Poggas.

³ In addition to the clauses quoted in fns. 1 and 2, supra, art. 2—seniority, sec. 18, contained language which was occasionally used to discipline employees who failed to return to work at the end of authorized leaves. In general such an employee was subject to the loss of seniority. The clause has little, if any, application to the circumstances of this case.

⁴ See art. 13 and 14 of the current contract.

B. The Absentee Control Programs

Fuller's complaint resulted in Poggas drafting the first absentee control program. That program was put into effect on December 13, 1978. Respondent agrees that prior to the implementation of the policy it did not notify any union official about it nor give the Union an opportunity to bargain over it. Union President Roger Herrera, also the chief shop steward, first became aware of the policy when he saw it on the board.

Shortly thereafter, in January 1979, the program was modified. (See R. Exh. 5.) Herrera testified that it was modified as a result of a conversation he had had with Production Manager Jones. Plant Manager Mohns, however, stated the program was modified after an employee made some valid criticisms. Whatever the case, it was modified again on June 1, 1979. Herrera testified that this modification occurred after he and Fuller met with Poggas and Jones and attempted to negotiate some changes. Mohns testified that the revision occurred after Jones and Poggas spoke to him about it. He said he never showed it to the Union until after it had been put into effect on June 1. A recordkeeping modification was made on January 1, 1980.

The last program continued in effect until November 1981. By letter dated August 21, 1981, D. L. Thoreson, the new industrial relations manager, wrote a letter to the Union in which he asserted that the absentee rate was unacceptable and to correct the situation Respondent would shortly implement a new absentee control policy. He suggested a meeting with union officials the following week. A copy of the new policy was attached to his letter.⁵ The Union's International representative, D. E. "Bill" Stutts, replied by letter dated August 25 demanding "the right to bargain over the establishment of an absentee policy" including the question of a need for a new policy, and "the right to bargain over the effects" of any new policy. He further asserted that in order to bargain intelligently over the matter the Union needed certain information and demanded that the Company supply the following:

- A. 1. Data on absenteeism for each current employee.
2. Categories and explanations for absences.
3. An explanation of how the company distinguishes an occupational absence from a nonoccupational absence.
4. A full history of any disciplinary actions due to attendance problems. Include name of disciplined workers, department he or she works in, health and safety hazards present in the department.
5. Identification of each worker by age, sex, race and head of household.
6. Identification of major medical payments for employees.
7. Copies of any reports prepared on attendance.

⁵ I do not deem the differences in the new policy to be of particular concern. In some respects it is a "tougher" policy than its predecessor; yet in others it is more lenient. Without making any detailed analysis of the two it is fair to conclude that the new policy, overall, is slightly less permissive than the old. It is not a radical change.

- B. 1. Who participated in the establishment of the policy, when were meetings held, who was present.
2. Copies of any data considered in drafting the policy.
3. Copies of any earlier drafts.
4. Who informed the Union or made the decision not to inform the union.

Stutts concluded his letter by stating that failure to provide the information would be interpreted as an unlawful refusal to bargain; likewise, so would the Company's failure to commit itself to bargain over the new policy and its effects.

By letter dated September 16 Thoreson sent Stutts a copy of the January 1, 1980, absentee control policy. He asserted that while Respondent desired cooperation from the union regarding the control of absenteeism it was nonetheless Respondent's position that "reasonable rules and regulations will continue to be promulgated from time to time as business needs dictate," thereby pointing to Respondent's past practice on the topic as well as the Union's alleged acquiescence to it. Thoreson reminded Stutts that the grievance procedure was available if the Union believed Respondent's "current actions to better control absenteeism" were in some way a contract violation. He concluded by saying that Respondent "remains ready to discuss with the Union the absentee control policy and to clarify any section of the policy or their application." He suggested that if there were any questions regarding the new policy union officials meet with company officials promptly as Respondent intended shortly to implement it.

Stutts replied by letter dated September 21 reasserting his desire to bargain over changes in the absentee program saying that the Union could not do so until it had received the information requested in his letter of August 25. He reiterated his position that a failure to supply the information would constitute a refusal to bargain and that without the sought-for information he could not intelligently bargain over the matter.

Thoreson replied on October 5 repeating his offer to discuss or clarify the revised absentee control program and offered to meet with the Union on October 8, 9, 12, or 13.⁶ The Union did not accept the offer to meet the discussion or clarification,⁷ instead choosing to await the information. Thoreson did not supply it and on October 27 wrote Stutts a letter saying Respondent would place the absentee control program into effect on November 9. Once again he offered to meet with Stutts or other union officials to clarify any question or concerns.

On October 30 Stutts wrote another letter to Thoreson asserting that implementation of the program would require the Union to file the instant charge.⁸ As an-

nounced, Respondent implemented the revised absentee control program on November 9.

IV. ANALYSIS AND CONCLUSIONS

Counsel for the General Counsel contends that Respondent violated Section 8(a)(5) and (1) of the Act in two ways. First, it failed to provide to the union the underlying data on which it relied to reach the decision that the absentee control policy needed revision in late 1981. Second, he asserts that Respondent unilaterally implemented the new program without giving the Union the opportunity to bargain over it. Respondent views the matter somewhat differently. It agrees that it did not give the Union the opportunity to "negotiate" over the terms of the policy asserting that both by contract and conduct the Union had waived its right to do so. Second, it asserts that because there was no duty to bargain over the subject matter, it follows that it had no obligation to provide the information.

The legal source of the Union's demand for information and for negotiation over the absentee program is Section 8(d) of the Act.⁹ *Timken Roller Bearing Co. v. NLRB*, 325 F.2d 746 (6th Cir. 1963), cert. denied 376 U.S. 971 (1964). In view of the fact that these are statutory rights, rather than rights derived solely from a collective-bargaining agreement, the issue is whether or not the Union has relinquished either the right to bargain or the right to information by language or conduct constituting a "clear and unmistakable" waiver. *Timken Roller Bearing Co. v. NLRB*, supra.¹⁰ There appears to be little doubt that Respondent, acting on its interpretation of the management-rights and dismissal clauses of the collective-bargaining contract has first, on an ad hoc basis, disciplined employees for attendance transgressions and second, beginning in 1978 promulgated specific disciplinary rules regarding attendance matters. Indeed these rules preceded the current collective-bargaining agreement and the Union does not appear to have opposed either their initial establishment or their continued application during the transition from the contract which expired in 1979 to the term of the 1979-1982 agreement. There is some testimony, principally from Union President Herrera, that bargaining or negotiations of a sort occurred during the modifications of the earlier plans. Company Official Mohns has a different recollection. I am not prepared to credit or discredit either version as it appears that the subject was not one of great import, probably due to the paucity of incidents, and received only passing attention from both sides. In that sense the recollections of each witness tend to reflect their current

⁹ In pertinent part Sec. 8(d) reads:

(d) For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet . . . and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement or any question arising thereunder . . .

¹⁰ The test for waiver of a contract right does not appear to be as rigid and may take into account other relevant factors. See, for example, *Radioear Corp.*, 199 NLRB 1161 (1972) (Members Fanning and Jenkins dissenting), and *Valley Ford Sales*, 211 NLRB 834 (1974) (Members Fanning and Jenkins dissenting), aff'd. sub nom. *Machinists Lodge 87 v. NLRB*, 530 F.2d 849 (9th Cir. 1976).

⁶ Thoreson also commented that an assertion made by Stutts to the effect that the information had been promised was incorrect.

⁷ The parties distinguish "discussion and clarification" from "negotiation" or "bargaining."

⁸ In addition to the letters recounted above, Stutts and other union officials had frequent telephone and face-to-face conversations with Thoreson and other company officials regarding the plan. As these conversations are to the same effect as the letters, there is no reason to describe them.

beliefs as to what happened; yet neither version can be fully credited or discredited on the basis of any objective criteria. Recognizing the passage of time since the first program was implemented it is likely that the recollections of each are somewhat hazy and colored by more current interests. I reach this conclusion despite the fact that both Herrera and Mohns had specific dates in mind as they testified. It may be that each had recently referred to notes he had taken but that has not been shown. It is quite improbable that either individual could recall conversations with certainty, much less specific dates, happening 3 to 4 years prior to their testimony.

What is clear is that Respondent had disciplined employees without the authority of any plan prior to 1978 and in that year, at the prompting of a union official, implemented a comprehensive absentee control policy. When inadequacies in that policy became apparent, modifications were made with the knowledge and the acquiescence of the Union and with some consideration being given to union or employee concerns about the nature of the policy.¹¹

Indeed the 1981 approach was the same. Respondent perceived defects in the existing program, drafted a new one, supplied the Union with a copy, and gave it an opportunity to comment and question it. The Union, however, instead of acting as it had previously, demanded to know what the underlying incidents were which necessitated a change and demanded to bargain over it.

The management-rights clause, together with the dismissal clause, as tempered by the grievance-arbitration procedure, certainly gives some credence to Respondent's claim of waiver. The question however is whether or not the clauses, coupled with the Union's conduct during the 1978-1979 modifications, constituted a "clear and unmistakable waiver" of the statutory right to bargain over this mandatory term and condition of employment.¹² The dismissal clause plainly gives Respondent the right to discipline employees for "neglect of duty" and it is not unreasonable to interpret excessive absenteeism as a transgression of that article. Furthermore, management, as contemplated by the management-rights clause, has not surrendered its authority to establish and maintain hours of work in any other provision of the collective-bargaining agreement.

Finally, the Union's conduct appears to be an acquiescence in that interpretation of the agreement, although that is not absolutely clear. The first absentee control program was implemented as a result of a union official's complaint. Yet the Union neither sought nor obtained any input regarding the drafting of the initial comprehensive plan, nor did it complain about it. Later the plan was modified at either the behest of a union official or an employee but still without any union demands for specific input. Two other modifications occurred without either complaint or input from the Union. The sum of this concern, or lack of it, is a strong suggestion that the

Union, until 1981, was not overly disturbed by the existence of an absentee control policy. Yet, that conduct, when coupled with the language of the dismissal¹³ and management-rights clauses, appears to me to rise to the level of a conscious relinquishment of the right to engage in midterm bargaining over the terms of the plan, and I so find. *Laredo Packing Co.*, 254 NLRB 1 at 8-9 (1981). Cf. *Bancroft-Whitney Co.*, 214 NLRB 57 (1974) (Member Jenkins dissenting).¹⁴

The same cannot be said for the demand for information. Although Stutts demanded the information in August 1981, for the specific purpose of understanding the need for the fourth absentee control plan, I observe that the collective-bargaining agreement had only a year to run. Thus, even if Stutts, once having obtained the information, was unable to persuade Respondent to modify the plan in midterm, the Union may still have wished to inject it into the collective-bargaining process during the 1982 negotiations.

I have, therefore, considered Respondent's argument that if it had no obligation to bargain over the program itself it had no obligation to provide information regarding it. I am not persuaded. By the terms of Section 8(d), collective bargaining is an ongoing matter and while it may be subject to fits and starts it may not be conducted in the dark. *Fafnir Bearing Co. v. NLRB*, 362 F.2d 716, 717 (2d Cir. 1968). Information relevant to collective bargaining must be available to both parties and the Act so requires. Thus, even though one might determine, as I have, that the Union has waived its right to actually bargain about a specific topic midterm in a collective-bargaining agreement it does not follow that the underlying data should not be made available to the Union during a contract's period; it may be of use in future collective bargaining. *NLRB v. Otis Elevator Co.*, 208 F.2d 176 at 179 (2d Cir. 1953); *Univis, Inc.*, 169 NLRB 37 at 39-40 (1968). An absentee control policy is a mandatory subject of bargaining and even if a collective-bargaining agreement does not specifically touch upon that topic or the topic has been waived, an informed union may well persuade an employer to bargain midterm or may choose to wait to bargain about it upon the contract's expiration. Considering both possibilities, relevant information regarding mandatory topics must be turned over no matter when the demand is made.

The general rule is that an employer is obligated to provide the employees' statutory bargaining representative with information in its possession relevant to collective bargaining. *Detroit Edison Co. v. NLRB*, 440 U.S. 301 (1979); *NLRB v. Acme Industrial Co.*, 385 U.S. 432 (1967); *NLRB v. Truitt Mfg. Co.*, 351 U.S. 149 (1956); *Curtiss-Wright Corp. v. NLRB*, 347 F.2d 61 (3d Cir. 1965); *Fafnir Bearing Co.*, 146 NLRB 1582 (1964), *enfd.* 362 F.2d 716 (2d Cir. 1968). No doubt some of the mate-

¹¹ One employee who lived a long distance from the plant was afraid he might be penalized for tardiness beyond his control, i.e., freeway tie-ups. He was assured that individual circumstances would be taken into account.

¹² Absentee control is an "hours" topic within the meaning of Sec. 8(d).

¹³ The dismissal clause here, as well as its interpretation, distinguishes this case from *Murphy Diesel Co.*, 184 NLRB 757 (1970), *enfd.* 454 F.2d 303 (7th Cir. 1971), as that contract contained only a generalized management-rights clause.

¹⁴ *Bancroft-Whitney* appears to follow the less stringent waiver analysis of *Radioear*, *supra*; yet the Union's conduct there was strong enough to support a waiver even under the more stringent standard. Also, cf. *Valley Ford Sales*, *supra* (arbitrator found acquiescence).

rial sought in Stutts' August 25 letter is relevant. Yet neither the General Counsel nor the Union has demonstrated the relevancy of other sought-for material; indeed, the language of the letter is vague in some respects.

The issue then is whether the material sought by Stutts is relevant to the solution of the problem of absenteeism. If the data Stutts seeks is relevant to that issue, it is producible. If not relevant, it is not. Some matters are presumptively relevant and proof is therefore unnecessary.¹⁵

If the information is not presumptively relevant, relevance must be shown. That burden rests with the party demanding production. *Newspaper Guild v. NLRB (Union-Tribune Publishing Co.)*, 548 F.2d 863 (9th Cir. 1977), affg. 220 NLRB 1226 (1975). With these principles in mind, and continuing to note the lack of relevancy proof generally, I shall determine the relevance of each item Stutts seeks, using the language and format of his August 25 letter.

Items Presumptively Relevant—

A.

1. Data on absenteeism for each current employee.
2. Categories and explanations for absences.
3. An explanation of how the company distinguishes an occupational absence from a non-occupational absence.
7. Copies of any reports prepared on attendance.

B.

2. Copies of any data considered in drafting the policy.

Little needs to be said about the relevance of the above-listed items. For the most part it is self-evident. Obviously raw data, together with definitions of absence types and reports thereon, would be of assistance either to establish an absenteeism policy or to determine the rationality of one.

The following items, however, do not enjoy such clarity of purpose:

No Proof of Relevancy—

- A. 4. A full history of any disciplinary actions due to attendance problems. Include names of disciplined workers, department he or she works in, health and safety hazards present in the department.
5. Identification of each worker by age, sex, race and head of household.
6. Identification of major medical payments for employees.

With respect to these matters, one can, by straining, envision circumstances whereby relevance could become

¹⁵ E.g., wage data is presumptively relevant to collective bargaining in general. *NLRB v. Curtiss-Wright Corp.*, supra.

apparent. Yet no party has offered proof of relevancy. I shall not strain to do so. Moreover, with respect to item A.4., discipline history, that material is no doubt already in the Union's hands, assuming that the notification to the Union required by the dismissal clause is being honored. There is no reason, on this record, to think it is not. With regard to the need for racial identification, I am not able, even by straining, to envision how that might be relevant to absenteeism.

In the absence of proof that the above matters are relevant, I shall not order their production. *Newspaper Guild v. NLRB*, supra.

Not Relevant

B. 1. Who participated in the establishment of the policy, where meetings were held, who was present.

3. Copies of any earlier drafts [of the 1981 plan].

4. Who informed the Union or made the decision not to inform the Union.

None of these items would be helpful to determine either the need for an absentee program or to determine the rationality of an existing program. These seek the identities of persons involved in corporate decision-making or the nature of programs which have never been implemented. Neither the identities of decision-makers nor rejected plans can assist the Union in its avowed purpose here.

I hold that the Union is entitled only to the material deemed to be presumptively relevant as set forth above.

In conclusion, I find that Respondent violated Section 8(a)(5) of the Act by failing to turn over to the union data in its possession relevant to the perceived need for an absentee control program. However, I have found at the same time that the Union, both by specific contract language and by its conduct, acquiesced in the implementation on a midterm basis, of the 1981 absenteeism control plan and Respondent therefore did not violate Section 8(a)(5) and (1) in that regard by unilaterally implementing it in November.

Based on the foregoing findings of fact and on the entire record in this case, I make the following

CONCLUSIONS OF LAW

1. Respondent Emery Industries, Inc. is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. Respondent violated Section 8(a)(5) and (1) of the Act when in August 1981 and thereafter it refused to supply the Union with information relevant to collective bargaining.

4. Respondent did not engage in any other violation of the Act.

[Recommended Order omitted from publication.]